Ribaru Bina Sdn Bhd & Anor v Bakti Kausar Development Sdn Bhd & Anor

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W–02–399 OF 2003
GOPAL SRI RAM, SURIYADI AND ABDULL HAMID EMBONG JJCA
30 NOVEMBER 2006

Civil Procedure — Summary judgment — Appeal — Point not raised in defence nor affidavit — Whether triable issues raised

The claim is based on a contract (building contract) awarded to the first defendant and wholly sub-contracted to a company called TK Yokohama Construction Sdn Bhd. Then, by the terms of a novation agreement, the first plaintiff agreed to perform all the obligations that TK Yokohama Construction Sdn Bhd was to perform under the building contract. Later, construction work commenced. The second defendant issued progress payment certificates Nos 2 to 11 to the second plaintiff. All these certificates were issued under its own hand. Subsequently, the parties mutually terminated the contract. It is common ground that the second defendant did not pay any sum on certificate No 11. And it is this certificate that forms the subject matter of the plaintiffs claim. The senior assistant registrar entered judgment for the plaintiff for part of its claim. The learned judge reversed the order of the senior assistant registrar. This appeal is now directed against the order of the High Court granting the defendant/respondent unconditional leave to defend the action. Various grounds were advanced by the defendants, inter alia: (i) that there was no privity of contract either between the plaintiffs and the second defendant or between the second plaintiff and the defendants; (ii) that certificate 11 is a final certificate and is therefore subject to deductions and a set off in respect of works not properly executed by the plaintiffs; (iii) there is here not an immediately payable debt because there is no time specified within which the monies certified by certificate 11 should be paid.

Held, allowing the appeal:

(1) The ground on no privity of contract was not pleaded in the defendants' defence nor was it raised in the affidavits filed on their behalf. On a summons for judgment, a triable issue must be raised by a defendant either by way of an affidavit filed in opposition to the summons or alternatively in a statement of defence. To raise triable issues by way of submission on a point not raised in a defence or an affidavit would not, in our judgment, meet the requirements of procedural fairness which is the essence of any litigation. The learned judge ought not to have taken any notice of the submission on the privity of contract point (see paras 4–5).

(2) There is no merit in the argument that certificate 11 is a final certificate. When certificate 11 is compared with certificates 1 through 10, it will be found that it is in the same form as those other certificates. There are only two deductions which all eleven certificates provide for. These are the previous interim payments and the retention sum of 10%. Hence, it cannot be correct to describe certificate 11 as a final certificate. It is clear that there is no contractual provision conferring upon the defendants a right of set off against the plaintiffs in respect of the work done under certificates 1 through 11 (see paras 10–11).

(3) Once certificate 11 was issued by the second defendant specifying the amount that was due under that certificate, it became an immediately payable debt. Certificate 11 is accordingly, an admission by the second defendant to the second plaintiff that the sum stated therein is due and payable. The defendants' attempts to discover all sorts of excuses to avoid paying the second plaintiff what is due to it for work done strongly supports an inference that the defendants' lack of bona fides (see para 12).

[Bahasa Malaysia summary

Tuntutan ini adalah berdasarkan satu kontrak (kontrak pembinaan) yang diawadkan kepada defendan pertama dan kesemuanya disubkontrakkan kepada satu syarikat bernama TK Yokohama Construction Sdn Bhd. Selepas itu, melalui terma-terma satu perjanjian novasi, plaintif pertama bersetuju melaksanakan kesemua obligasi-obligasi yang sepatutnya dilaksanakan oleh TK Yokohama Construction Sdn Bhd di bawah kontrak pembinaan tersebut. Seterusnya, pekerjaan membina bermula. Defendan kedua mengeluarkan sijil-sijil pembayaran kemajuan No 2 sehingga 11 kepada plaintif kedua. Kesemua sijil-sijil ini dikeluarkan oleh defendan kedua sendiri. Selepas dari itu, pihak-pihak menamatkan kontrak tersebut dengan persetujuan bersama. Ia adalah dipersetujui bahawa defendan kedua tidak membayar sebarang jumlah atas sijil No 11. Dan sijil inilah yang membentuk perkara pokok tuntutan plaintif. Penolong kanan pendaftar telah memasukkan penghakiman kepada plaintif atas sebahagian tuntutannya. Hakim yang bijaksana mengakas perintah penolong kanan pendaftar tersebut. Rayuan ini adalah terhadap perintah Mahkamah Tinggi yang membenarkan defendan/responden kebenaran tanpa bersyarat untuk membela tindakan ini. Pelbagai alasan-alasan dikemukakan oleh defendan-defendan, antara lain: (i) bahawa tiada priviti kontrak antara plaintif-plaintif dan defendan kedua ataupun di antara plaintif kedua dan defendan-defendan; (ii) bahawa sijil 11 adalah sijil terakhir dan dengan itu tertakluk kepada potongan dan tolakan (set off) berhubungan dengan kerja-kerja yang tidak dilaksanakan dengan sempurnanya oleh plaintif-plaintif; (iii) tidak terdapat satu hutang yang kena dibayar dengan serta merta oleh kerana tiada tempoh yang dinyatakan di mana jumlah yang dinyatakan di sijil 11 harus dibayar.

Diputuskan, membenarkan rayuan tersebut:

(1) Alasan tiada priviti kontrak tidak diplidkan di pembelaan defendan-defendan ataupun dibangkitkan di afidavit-afidavit yang difailkan bagi pihak mereka.

Dalam satu saman untuk penghakiman, satu isu yang perlu dibicarakan harus dibangkitkan oleh defendan sama ada melalui afidavit yang difailkan dalam menentang saman tersebut ataupun secara alternatif di dalam pernyataan pembelaan. Dalam membangkitkan satu isu yang perlu dibicarakan melalui hujahan atas satu perkara yang tidak dibangkitkan di pembelaan ataupun afidavit tidak, di dalam keputusan kami, mematuhi keadilan prosedur yang merupakan inti pati sebarang litigasi. Hakim yang bijaksana sepatutnya tidak harus mengambil sebarang notis akan hujahan priviti kontrak tersebut (lihat perenggan 4–5).

(2) Tiada merit dalam hujahan bahawa sijil 11 adalah sijil terakhir. Apabila sijil 11 dibandingkan dengan sijil-sijil 1 sehingga 10, ia dapat dilihat bahawa ia adalah sama seperti sijil-sijil yang lain. Hanya terdapat dua kesimpulan di mana kesemua sebelas sijil-sijil diberikan. Ia merupakan bayaran interim yang terdahulu dan pengekalan jumlah 10%. Dengan itu, ia adalah tidak betul untuk menghuraikan sijil 11 sebagai sijil terakhir. Ia adalah jelas tiada peruntukan kontraktual yang memberikan defendan-defendan hak penolakan terhadap plaintif-plaintif berhubungan dengan kerja-kerja yang telah dilakukan di bawah sijil-sijil 1 hingga 11 (lihat perenggan 10–11).

(3) Apabila sahaja sijil 11 dikeluarkan oleh defendan kedua menyatakan jumlah yang perlu dibayar di bawah sijil tersebut, ia serta merta menjadi hutang yang perlu dibayar. Sijil 11 dengan itu, adalah pengakuan oleh defendan kedua kepada plaintif kedua bahawa jumlah yang dinyatakan di situ adalah di hutang dan kena dibayar. Percubaan defendan-defendan untuk mencari segala alasan-alasan untuk mengelakkan daripada membayar plaintif kedua apa yang dihutangkannya untuk kerja-kerja yang telah disiapkan menyokong satu inferens bahawa defendan-defendan kekurangan bona fide (lihat perenggan 12).]

Notes

For cases on appeal of summary judgment, see 2 *Mallal's Digest* (4th Ed) Consolidated Subject Index paras 6070–6188.

Cases referred to

Bank Negara Malaysia v Mohd Ismail & Ors [1992] 1 MLJ 400 (refd)
Citibank NA v Ooi Boon Leong & Ors [1981] 1 MLJ 282 (refd)
Crown House Engineering Ltd v Amec Projects Ltd 48 BLR 32 (refd)
Ellis Mechanical Services Ltd v Wates Construction Ltd [1978] 1 Lloyd's Rep 33 (refd)
Fadzil bin Mohamed Noor v Universiti Teknoiogi Malaysia [1981] 2 MLJ 196 (refd)
Lee Teng Siong v Lee Kheng Lian & Ors [2006] 5 MLJ 609 (refd)
Ling Heng Toh & Co v Borneo Development Corpn Sdn Bhd [1973] 1 MLJ 23 (refd)
Lubenham Fidelities & Investment Co Ltd v South Pembrokeshire District Council (1985) 33 BLR 39 (refd)
Pembenaan Leow Tuck Chui & Sons Sdn Bhd v Dr Leela's Medical Centre Sdn Bhd [1995] 2 MLJ 57 (refd)
Penang Port Commission v Kanawagi Seperumaniam (No 3) [1998] 4 CLJ 8 (refd)
Permodalan Plantations Sdn Bhd v Rachuta Sdn Bhd [1985] 1 MLJ 157 (refd)

Legislation referred to
Rules of the High Court 1980 O 14 r 1

Appeal from: Suit No D1–22–822 of 2002 (High Court, Kuala Lumpur)

VK Lingam (Pradeep Kumar with him) (VK Lingam & Co) for the appellants.
K Anantham (K Siva Kumar with him) (Skrine) for the respondents.

Gopal Sri Ram JCA (delivering judgment of the court):

[1] This appeal is directed against the order of the High Court granting the defendant (respondent before us) unconditional leave to defend the action. In doing so, the learned judge reversed the order of the senior assistant registrar entering judgment for the plaintiff (appellant before us) for part of its claim. The plaintiff had claimed a sum of RM12,391,117.85. But the registrar only granted judgment for RM5,835,327.31, directing that the balance should go for trial. The plaintiff made no complaint about this latter portion of the registrar's decision. However, the defendant appealed to the judge who, as we said a moment ago, allowed the appeal.

[2] Now, we must say at once that this court does not as a general rule entertain appeals against orders granting unconditional leave to defend (see *Lee Teng Siong v Lee Kheng Lian & Ors* [2006] 5 MLJ 609. But there may be cases where appellate intervention is called for reasons of justice. Such cases include but are not confined to those which turn 'on the construction of a few documents and the court was only concerned with what, in its judgment, was the true construction' (per Raja Azlan Shah CJ (Malaya) in *Fadzil bin Mohamed Noor v Universiti Teknoiogi Malaysia* [1981] 2 MLJ 196): or 'where all the issues are clear and the matter of substance can be decided once and for all without going to trial' (per Raja Azlan Shah CJ (Malaya) in *Citibank NA v Ooi Boon Leong & Ors* [1981] 1 MLJ 282: or which concerns the interpretation of a statute (see *Fadzil bin Mohamed Noor*). The facts here are, in so far as the sum in respect of which the registrar entered summary judgment, clear and uncomplicated. And they are as follows.

[3] The Government of Malaysia awarded the first defendant a contract to build and develop a transit camp at Setapak in Kuala Lumpur. We will, for convenience, refer to that contract as 'the building contract'. The building contract was worth RM66m. By a letter dated 15 August 1997, the first defendant sub-contracted the whole of the building contract to a company called TK Yokohama Construction Sdn Bhd for a sum of RM51m. Then, by the terms of a novation agreement dated 20 October 1999, the first plaintiff agreed to perform all the obligations that TK Yokohama Construction Sdn Bhd was to perform under the building contract. In consequence, the latter was released and discharged from performing the building contract. On 1 November 1999, the first plaintiff entered into a joint venture agreement with the second plaintiff. That agreement made it clear that the second plaintiff had been offered loan facilities by Bank of Commerce (M) Bhd to finance the works under the building contract; that the second plaintiff would have the responsibility of arranging funds to complete those works; and that the second

plaintiff had lead control over the building contract. By a letter dated 1 July 1999, the second defendant wrote to the Bank of Commerce informing the latter of the following matters. First, that it was the holding company of the first defendant; second, that the it was the main contractor for the works under the building contract; third, that the second plaintiff was the second defendant's main sub-contractor for those works; fourth, it irrevocably authorised the opening of an escrow in the second defendant's name; and fifth, it asked that all proceeds paid into or to be paid into the escrow account were to be credited directly into the second plaintiffs account with the Bank of Commerce. Later, construction work commenced. The second defendant issued progress payment certificates Nos 2 to 11 to the second plaintiff. All these certificates were issued under its own hand. It paid the second plaintiff a sum of RM13,574,227.71 under progress payment certificates Nos 2 to 10. Subsequently, the parties mutually terminated the contract. It is common ground that the second defendant did not pay any sum on certificate No 11. And it is this certificate that forms the subject matter of the plaintiffs claim.

[4] The first ground advanced by the defendants as constituting a triable issue is that there was no privity of contract either between the plaintiffs and the second defendant or between the second plaintiff and the defendants. This ground was however not pleaded in the defendants' defence. Nor was it raised in the affidavits filed on their behalf. The defendants however raised this issue by way of argument. Their counsel submitted that he was entitled to do this because of the phrase 'by affidavit or otherwise' appearing in O 14 r 1 of the Rules of the High Court 1980. With respect, we are unable to agree with this submission. In our judgment, on a summons for judgment, a triable issue must be raised by a defendant either by way of an affidavit filed in opposition to the summons or alternatively in a statement of defence. We would here respectfully follow and apply the decision of this court in *Penang Port Commission v Kanawagi Seperumaniam (No 3)* [1998] 4 CLJ 8, where Abdul Malek Ahmad JCA, said:

> In an application for summary judgment, O 14 r 4(1) of the Rules of the High Court 1980 ('RHC') applies and it is to the effect that a defendant may show cause against the application by affidavit or otherwise to the satisfaction of the court. That means that cause against the application can be shown by affidavit or in a statement of defence.

[5] To raise triable issues by way of submission on a point not raised in a defence or an affidavit would not, in our judgment, meet the requirements of procedural fairness which is the essence of any litigation. In the present case, we are of the opinion that the learned judge ought not to have taken any notice of the submission on the privity of contract point as it had not been raised in the affidavit or the defence. There is therefore merit in the plaintiffs complaint on this part of the case. In the course of argument, learned counsel for the appellant referred us to a body of material, including the letter of 1 July 1999, which taken in its totality clearly shows that the defendants, at all material times, accepted that there was privity of contract between them and the plaintiffs. However, in view of the view we have already expressed on the privity point we find it unnecessary to dwell any longer on this part of the case.

[6] The second issue which the defendants raised as being triable is that interim certificate 11 was not certified in accordance with the terms of the building contract. There are two facets to this part of the case. In the first place, it was suggested by the defendants that there is a need for the superintending officer and the project director to sign the certificate. On this point, it is to be noted that the building contract in cl 7.0 (i) provided for payment to be made based on 5% of the Contract Price and for such payments to be certified by the superintending officer and the project director of the Ministry of Defence. However, this requirement was varied by TK Yokohama Construction Sdn Bhd in its letter of letter of 21 August 1999 accepting the offer of the building contract. In that letter, TK Yokohama Construction Sdn Bhd made it clear that it agreed to the terms of the building contract 'except for cl 7.0 (i) where progress payment claims shall be made on a monthly interim basis and not based on 5% of the Contract Price'. The defendants accepted this variation. The requirement for certification of the work by the superintending officer and the project director accordingly ceased to be applicable and it was on this basis that the building contract was proceeded with by the plaintiffs and the defendants. This is evidenced by the fact that certificates 1 through 10 were honoured and paid by the defendants although the superintending officer and the project director did not sign any of them. So there is nothing in this point.

[7] In the second place, it was submitted that certificate 11 was bad because only one director of the second defendant, namely, Hj Tarin Ayub, signed it whilst Hj Baharin Ayob, the managing director of the second defendant did not. But there is no requirement anywhere in the building contract as to how many directors of the second defendant should sign a certificate before it will be valid. On the other hand, if you look at certificate 7, you will see that Hj Baharin Ayob signed it but Haji Tarin Ayub did not. Yet, the second defendant honoured certificate 7 by making payment on it.

[8] To rebut the plaintiffs' argument that certificate 7 had not been approved by Hj Tarin Ayub, the second defendant produced an internal memorandum dated 22 December 2000. The purpose of adducing that document was to show that Hj Tarin Ayub had approved certificate 7 although he had not actually signed the certificate. Now, certificate 7 for the sum of RM1.5m was prepared by the defendants on 8 January 2001 and verified on 12 January 2001. However, the internal memorandum approving certificate No 7 was already prepared on 22 December 2000, that is to say, even before certificate 7 had come into existence. This casts serious doubts on the genuineness of the internal memorandum and consequently on the bona fides of the defendants in resisting the plaintiffs' claim.

[9] The third point raised before us by learned counsel for the defendants is that certificate 11 is a final certificate and is therefore subject to deductions and a set off in respect of works not properly executed by the plaintiffs. In support of their case that work was improperly done, the defendants relied on a document produced by Sutomo & Associates. In that document, M/s Sutomo & Associates set out their valuation of the work done by the plaintiffs which according to them falls short of the plaintiffs' claim. The valuation is dated 9 May 2002 although certificate 11 was issued on 8 May 2001. Sutomo & Associates signed the valuation on 23 August 2002

whilst first defendant signed it on 30 August 2002. The plaintiffs' summons for judgment was taken out on 1 August 2002. In the light of the foregoing chronology, there is much force in the plaintiffs' argument that the suggestion that the work done was defective and improper is an afterthought on the part of the defendants meant to delay the plaintiffs' from obtaining final judgment on the sum set out in certificate 11.

[10] Further, in our judgment there is no merit in the argument that certificate 11 is a final certificate. When certificate 11 is compared with certificates 1 through 10, it will be found that it is in the same form as those other certificates. There are only two deductions which all eleven certificates provide for. These are the previous interim payments and the retention sum of 10%. Hence, it cannot be correct to describe certificate 11 as a final certificate. The effect of an interim certificate such as certificate 11 in the present case was described by Edgar Joseph Jr FCJ in *Pembenaan Leow Tuck Chui & Sons Sdn Bhd v Dr Leela's Medical Centre Sdn Bhd* [1995] 2 MLJ 57 as follows (at p 75):

> [F]or all practical purposes, it [the interim certificate] conferred 'temporary finality' on the Certificate and a right to immediate payment in full in the absence of an express contractual provision permitting deduction of the matter in question.

See also *Lubenham Fidelities & Investment Co Ltd v South Pembrokeshire District Council* (1985) 33 BLR 39.

[11] Hearkening to the present instance, it is clear that there is no contractual provision conferring upon the defendants a right of set off against the plaintiffs in respect of the work done under certificates 1 through 11. Further, no right of set off was pleaded in the defendants' defence which is a requirement of the law of practice and procedure (see *Permodalan Plantations Sdn Bhd v Rachuta Sdn Bhd* [1985] 1 MLJ 157). Even assuming (without deciding) that the defendants' do have a right of set off on the facts here (which is not the case), that is a matter that must be resolved by way of adjustments when the final certificate comes to be issued (see *Ling Heng Toh & Co v Borneo Development Corpn Sdn Bhd* [1973] 1 MLJ 23).

[12] The next issue which was raised by the defendants is that there is here not an immediately payable debt because there is no time specified within which the monies certified by certificate 11 should be paid. We find no merit whatsoever in this argument. Once certificate 11 was issued by the second defendant specifying the amount that was due under that certificate, it became an immediately payable debt (see *Crown House Engineering Ltd v Amec Projects Ltd* 48 BLR 32). Further, in this case, unlike the usual case where it is an architect who issues an interim certificate, it is the second defendant itself that did so. Certificate 11 is accordingly, in our judgment, an admission by the second defendant to the second plaintiff that the sum stated therein is due and payable. The defendants' attempts to discover all sorts of excuses to avoid paying the second plaintiff what is due to it for work done strongly supports an inference that the defendants' lack of bona fides.

[13] Although the learned judge dealt with only two of the five issues raised by the defendants, as he was well entitled to, we have dealt with all the other issues raised

before us by the defendants. We have found this essential to demonstrate the lack of any bona fide triable issues in this case. As at the date of hearing of this appeal, the sum certified in certificate 11 had been outstanding for about five years. This long delay has enabled the defendants to put to their own use, monies that truly belong to the plaintiffs. This situation is unfortunate.

[14] We remind ourselves that this is a case in which the plaintiff sub-contractor is seeking to recover monies due to him on an interim certificate. The approach to cases of this nature is well settled and all we need do is to refer to two authorities on the point. First, *Ellis Mechanical Services Ltd v Wates Construction Ltd* [1978] 1 Lloyd's Rep 33 where Lawton LJ said:

> If the main contractor can turn round, as the main contractor has done in this case and say, 'Well, I don't accept your account; therefore there is a dispute', that dispute must be referred to arbitration and the arbitration must take its ordinary long and tedious course. Then the sub-contractor is put into considerable difficulties. He is deprived of his commercial life-blood. It seems to me that the administration of justice in our courts should do all it can to restore that life-blood as quickly as possible.... In my judgment it can be done if the courts take a robust approach, as the Master did in this case, to the jurisdiction under O 14.

The Federal Court in *Pembenaan Leow Tuck Chui & Sons Sdn Bhd v Dr Leela's Medical Centre Sdn Bhd* said that Lawton LJ's foregoing view 'indicates the correct approach which our courts should adopt in ordinary builders' claims under O 14'.

[15] The second authority is *Bank Negara Malaysia v Mohd Ismail & Ors* [1992] 1 MLJ 400, where the majority of the court held as follows (at p 408):

> Under an O 14 application, the duty of a judge does not end as soon as a fact is asserted by one party, and denied or disputed by the other in an affidavit. Where such assertion, denial or dispute is equivocal, or lacking in precision or is inconsistent with undisputed contemporary documents or other statements by the same deponent, or is inherently improbable in itself, then the judge has a duty to reject such assertion or denial, thereby rendering the issue not triable. In our opinion, unless this principle is adhered to, a judge is in no position to exercise his discretion judicially in an O 14 application. Thus, apart from identifying the issues of fact or law, the court must go one step further and determine whether they are triable. This principle is sometimes expressed by the statement that a complete defence need not be shown. The defence set up need only show that there is a triable issue.

[16] Applying the approach set out in the above two cases which are plainly binding on us, we are of the respectful view that the learned judge misdirected himself when he held that there were triable issues entitling the defendants to unconditional leave to defend in this case. For the reasons already given, the appeal is allowed, the order of the learned judge is set aside and the orders of the registrar are restored. The costs of this appeal and those incurred in the court below shall be borne by the respondents. The deposit in court shall be refunded to the appellants.

Appeal allowed.

Reported by Sally Kee